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3 UNITED STATES DISTRICT COURT
4 DISTRICT OF NEVADA
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6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 v.

9 ALEJANDRO ROJAS,

10 Defendant.

Case No.: 2:17-cr-00146-APG-NJK

ORDER

(Docket No. 56)

11 Presently before the Court is Defendant Alejandro Rojas' sealed *ex parte* motion for
12 issuance of a Rule 17 subpoena. Docket No. 56.¹

13 **I. BACKGROUND**

14 Defendant asks the Court to issue a subpoena to the Las Vegas Metropolitan Police
15 Department ("LVMPD"), directing it to produce numerous items relating to his arrest. *Id.* at 2-3.

16 **II. ANALYSIS**

17 The issuance of subpoenas in criminal cases is governed by Federal Rule of Criminal
18 Procedure 17. Rule 17(b) sets forth the procedure for defendants who cannot pay the requisite
19 witness fees and permits a defendant to submit an *ex parte* application requesting that a court issue
20 a subpoena. A court will permit issuance of a subpoena to a named witness "if the defendant shows
21 an inability to pay the witness's fees and the necessity of the witness's presence for an adequate
22 defense." Fed. R. Crim. P. 17(b). "Although prior judicial authorization is required, the *ex parte*
23 nature of a Rule 17(b) application serves to put a defendant on an equal footing with the
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25 ¹ Although Defendant filed his motion *ex parte* and under seal, the Court does not seal this
26 order or issue it *ex parte*. Defendant submits that he has already requested copies of these
27 documents from the United States. As a result, Defendant has submitted no information that is
28 unknown to the United States or should otherwise remain under seal.

1 Government because the Government is not required to give a defendant notice as to those
2 witnesses that it intends to subpoena to testify at trial.” *United States v. Sellers*, 275 F.R.D. 620,
3 622 (D. Nev. 2011) (citation and internal quotation marks omitted).

4 Federal Rule of Criminal Procedure 17(c) describes the process by which a court can issue
5 a subpoena *duces tecum* for the production of evidence before trial. Rule 17(c)(1) governs the
6 production of documents and objects. It provides:

7 A subpoena may order the witness to produce any books, papers, documents, data,
8 or other objects the subpoena designates. The Court may direct the witness to
9 produce the designated items in court before trial or before they are to be offered in
10 evidence. When the items arrive, the court may permit the parties and their
11 attorneys to inspect all or part of them.

12 Unlike a subpoena issued under Rule 17(a) or 17(b) to compel a witness to appear at trial,
13 subpoenas *duces tecum* may, within a court’s discretion, be made returnable before trial. Rule 17
14 is not, however, a discovery device. *See, e.g., Sellers*, 275 F.R.D. at 622-23 (collecting cases).
15 Nevertheless, Rule 17(c) may be used to obtain evidentiary materials. *See, e.g., id.* at 623 (citing
16 cases). Rule 17(c)(1) permits a party to subpoena a witness and require him to report only at either
17 a trial or hearing at which he is to testify. *See, e.g., id.* (collecting cases).

18 A party must obtain leave of court for a subpoena *duces tecum*, and various courts have
19 held that a court may, in its discretion, require production of documents prior to trial. *See, e.g., id.*
(citations omitted). The Supreme Court has stated that:

20 Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to
21 the sound discretion of the trial court since the necessity for the subpoena most
22 often turns upon a determination of factual issues. Without a determination of
23 arbitrariness or that the trial court finding was without record support, an appellate
24 court will not ordinarily disturb a finding that the applicant for a subpoena complied
25 with Rule 17(c).

26 *United States v. Nixon*, 418 U.S. 683, 702 (1974).

27 The party seeking production bears the burden of showing good cause for production
28 before trial. *See Sellers*, 275 F.R.D. at 623 (citation omitted). In *United States v. Iozia*, 13 F.R.D.
335, 338 (D.C.N.Y. 1952), the court established a standard that many other courts have since

1 adopted. *See Sellers*, 275 F.R.D. at 623 (collecting cases). The *Iozia* test requires that, to
2 demonstrate good cause for the issuance of a Rule 17 subpoena, a movant must show:

3 (1) That the documents are evidentiary and relevant;

4 (2) That they are not otherwise procurable by the defendant reasonably in advance
5 of trial by exercise of due diligence;

6 (3) That the defendant cannot properly prepare for trial without such production
7 and inspection in advance of trial and the failure to obtain such inspection may tend
unreasonably to delay the trial; and

8 (4) That the application is made in good faith and is not a general fishing expedition.

9 *Sellers*, 275 F.R.D. at 623.

10 The party seeking pretrial production bears the burden of establishing specificity,
11 relevancy, and admissibility. *Nixon*, 418 U.S. at 700. Thus, the party seeking pretrial production
12 must “show the evidentiary nature of the requested materials with appropriate specificity.” *Sellers*,
13 275 F.R.D. at 623. The specificity requirement is designed to prevent a party from using a
14 subpoena *duces tecum* as a “fishing expedition to see what may turn up.” *Bowman Dairy Co. v.*
15 *United States*, 341 U.S. 214, 220 (1951). Conclusory allegations of relevance and admissibility
16 are insufficient. *United States v. Eden*, 659 F.2d 1376 (9th Cir. 1981). Rather, the moving party
17 must show that there is a sufficient likelihood that the requested material is relevant to the offenses
18 charged in the indictment, and that the requested material contains admissible evidence regarding
19 the offenses charged. *Nixon*, 418 U.S. at 700.

20 The Court finds that Defendant has met the *Iozia* standard, and has established good cause
21 for the production of the requested documents prior to trial. In compliance with Rule 17(c)(1),
22 however, the Court directs the recipients of the subpoenas to produce the designated items to the
23 Clerk of Court, who shall inform counsel when the requested items are available, permitting
24 counsel for to inspect them. *Sellers*, 275 F.R.D. at 625.

25 Accordingly,

26 **IT IS ORDERED** that Defendant’s motion for subpoena, Docket No. 56, is hereby
27 **GRANTED** in part.

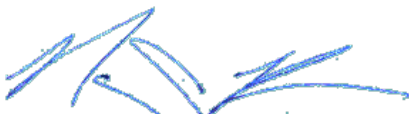
1 **IT IS FURTHER ORDERED** that the requested subpoena shall issue; however, the
2 requested items are to be delivered to the Court, rather than to the office of defense counsel.¹

3 **IT IS FURTHER ORDERED** that the witnesses shall produce the items responsive to the
4 subpoena no later than November 19, 2018, along with a copy of this order, to:

5 Clerk of Court
6 United States District Court for the District of Nevada
7 333 Las Vegas Blvd. South
8 Las Vegas, NV 89101

9 **IT IS SO ORDERED.**

10 DATED: November 5, 2018.

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13 NANCY J. KOPPE
14 UNITED STATES MAGISTRATE JUDGE

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25 ¹ Although the subpoena submitted by Defendant correctly lists the place of compliance as
26 this Courthouse, Docket No. 56-1, it contains the trial date, and not the requested date of
27 compliance. Further, the proposed order submitted by Defendant, Docket No. 56-2, improperly
28 lists the place of compliance as the office of defense counsel, but contains the requested date of
compliance.